

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA :

:

v. :

AFFIRMATION
20 Cr. 508 (VEC)

ROBERT GONZALEZ, :

Defendant. :

-----X

I, Sylvie Levine, hereby affirm under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

1. I am an Assistant Federal Defender with the Federal Defenders of New York and have been appointed to represent Robert Gonzalez in this case.

2. I make this affirmation in support of Mr. Gonzalez's motion to dismiss the indictment, as it was obtained in violation of Equal Protection as guaranteed by the Fifth Amendment to the United States Constitution, the right to a grand jury drawn from a fair cross-section of the community under the Sixth Amendment, and the Jury Selection and Service Act of 1968 ("JSSA"), 28 U.S.C. § 1861, et seq.

3. All statements herein are made upon information and belief, unless otherwise indicated.

4. The criminal complaint against Mr. Gonzalez was filed in the Manhattan Division of the Southern District of New York. See Dkt. No. 1. Mr. Gonzalez was presented before a Magistrate Judge in Manhattan. See Dkt. No. 5; Local Rule 6, Rules for the Division of Business Among District Judges, S.D.N.Y. An indictment was filed in the above-captioned case on September 22, 2020, and Mr. Gonzalez was assigned to a District Judge in Manhattan.

See Dkt. No. 6.

5. The government, by Assistant United States Attorney Brandon Harper, informed undersigned counsel that Mr. Gonzalez was indicted by a grand jury that was empaneled, and physically present, in White Plains. It was originally empaneled on January 9, 2019.

6. The criminal complaint makes clear that all of the alleged actions taken by Mr. Gonzalez took place in Bronx County, all the physical evidence was collected in Bronx County, and the victims were treated for their injuries and interviewed in Bronx County. See Dkt. No. 1 (“County of Offense: Bronx”). The Bronx is located in the Manhattan Division of the Southern District of New York. Cf. Local Local Rule 18, Rules for the Division of Business Among District Judges, S.D.N.Y. (“[a criminal] case is to be assigned to White Plains if the crime was allegedly committed in whole or predominant part in the Northern Counties,” i.e. “Counties of Dutchess, Orange, Putnam, Rockland, Sullivan and Westchester”).

7. I am familiar with the motion, memorandum of law, and declaration filed by the Federal Defenders of New York, in United States v. Balde, 20 Cr. 281 (KPF), Dkt. Nos. 60-61, which make the same challenges brought here. Mr. Gonzalez hereby incorporates the facts and legal arguments made therein.

8. In Balde, my office requested “records and papers used in connection with the constitution of the Master and Qualified Jury Wheels in the United States District Court for the Southern District of New York.” Balde, 20 Cr. 281, Dkt. No. 14. The Honorable Katherine Polk Failla, the Jury Administrator, and the parties conferred repeatedly regarding the disclosures. Id., Dkt. Nos. 25, 30, 36, 42, 48, 52. After the data was received by the defense, it was sent to a jury composition expert, Jeffrey O’Neal Martin, who filed a declaration attached to Mr. Balde’s motion. Id., Dkt. No. 61, Exh. A. Because the Master Wheel is refilled every four

years (in the September following the presidential election), id., the same Qualified Wheel (which is formed from the Master Wheel) must have been used to compose the grand juries that indicted Mr. Gonzalez and Mr. Balde. Thus, we hereby incorporate Mr. Martin's declaration regarding the White Plains Divisional Qualified Wheel to the instant motion.

9. As detailed in the Balde motion, during the COVID-19 pandemic, the United States Attorney's Office for the Southern District of New York did not wait until a grand jury drawn from the Qualified Wheel in the Manhattan Division and, instead, chose to indict Manhattan Division defendants – like Mr. Gonzalez – in the White Plains Division. Balde, 20 Cr. 281, Dkt. No. 61. The White Plains Division draws jurors exclusively from the northern counties in the Southern District of New York, and, therefore, excludes all residents from the county (Bronx) where this crime is alleged to have taken place. Id. “In doing so, it excluded large numbers of Black or African-American and Hispanic or Latino people from having a say as to whether [Mr. Gonzalez's] indictment...was sustained by probable cause.” Id.

10. Moreover, as detailed in the Balde motion, the expert discovered that the White Plains Division Grand Jury Wheel was not drawn from “a fair cross section of the community.” Id. “Systematic features of the Jury Plan led to underrepresentation of Black or African-American and Hispanic or Latino persons.” Id. “Further, in significant respects, the White Plains jury wheels were not constructed in accordance with the Jury Plan, resulting in more systematic exclusion of Black or African-American and Hispanic or Latino persons as well as the in the arbitrary exclusion of over 400,000 persons total.” Id.

11. Mr. Martin's declaration in Balde was filed on November 9, 2020. Thus, this motion is timely. See 28 U.S.C. § 1867(a).

WHEREFORE, on the grounds set forth herein and in the Balde motion and attachments

incorporated above, it is respectfully requested that this Court enter an Order dismissing the indictment and granting such further relief as this Court deems just and proper.

Dated: New York, New York
November 16, 2020

/s/
SYLVIE LEVINE
Assistant Federal Defender